(19)

No. 97-371

Supreme Court, U.S.
FILED
FEB 6 1998
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
Petitioners,
v.
KAREN FINLEY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF TWENTY-SIX ARTS, BROADCAST, LIBRARY, MUSEUM AND PUBLISHING AMICI CURIAE IN FAVOR OF RESPONDENTS

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I. INTEREST OF AMICI CURIAE

As more fully described in Appendix A, *amici curiae* include a broad range of literary, arts, cultural, and other organizations from across the country.[1] They are comprised of individual institutions such as the Museum of Modern Art,

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[1] Undersigned counsel authored this brief in its entirety on behalf of *amici*. No person, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

state and local organizations such as the New York Foundation for the Arts and the Putnam Arts Council, and nationwide organizations such as the National Assembly of State Arts Agencies, Americans for the Arts, and the American Arts Alliance. They represent many thousands of authors (PEN American Center), publishers (Association of American Publishers), librarians (Freedom to Read Foundation), musicians (American Music Center and The American Symphony Orchestra League), actors (Actors' Equity Association), dancers (Dance/USA), sculptors (International Sculpture Center), hundreds of museums (Association of American Museums; Association of Art Museum Directors), theaters (Theatre Communications Group), public broadcasters (National Public Radio), magazines (Council of Literary Magazines and Presses) and other artistic and cultural institutions. Many *amici* and their members regularly participate in government programs, including those sponsored by the National Endowment for the Arts ("NEA"). Almost all interact with the government in some way, ranging from obtaining funding to receiving tax exemptions. All share a common commitment to freedom of expression that unites them as *amici* in this case.

The rights of *amici* and their members and supporters, be they author, poet, novelist, artist, museum curator, librarian, public broadcaster, or other professional, to present the public with a broad range of viewpoints serve as a cornerstone of our nation's most fundamental freedoms. *Amici* are concerned that if government officials are permitted to grant or withhold government benefits on the basis of an applicant's viewpoint, the diversity of perspective and the "free play of the spirit" which all who deal with words or images "ought especially to cultivate and practice," will be stifled. *Keyishian v. Board of Regents*, 385 U.S. 589, 601 (1967) (citation omitted). If the government can deny federal support or benefits to individual authors and artists who, according to the government, have somehow transgressed vague notions of "decency and respect," then

the rights of countless institutions including *amici* to be free from a government official's view of what expression is proper or politically correct are threatened as well. *Amici* believe that the "decency and respect" clause violates fundamental First Amendment principles and accordingly support the decisions below.

II. SUMMARY OF ARGUMENT

This case is controlled by the principles set forth in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) governing the application of the First Amendment's Free Speech Clause to restrictions on speech in government-funded programs. Under *Rosenberger*, when the government is the speaker or enlists private entities to convey a governmental message, it is entitled to say what it wishes and may choose not to subsidize alternative or contrary viewpoints. In contrast, when the government funds a program intended to encourage private speech, it may not prefer one speaker over another on the basis of the speaker's viewpoint or the message he or she seeks to convey. In these situations, the First Amendment ban on viewpoint discrimination applies with full force. As the Department of Justice has recognized, the NEA grants at issue here are intended to encourage private speech, and therefore under *Rosenberger* the NEA cannot award or deny grants on the basis of an artist's viewpoint.

In 1990, as a result of a two-year Congressional campaign to deny NEA grants to dangerous or offensive art, Congress amended the NEA's governing statute to require the agency to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants. The "decency and respect" provision constitutes unlawful viewpoint discrimination. The "decency" prong requires the NEA to consider whether proposed projects conform with general standards of what society considers proper or moral; art that

expresses a viewpoint at odds with majority views of propriety or morality is ineligible for funding. The "respect" prong denies funding to projects likely to offend the "beliefs and values" of any segment of American society; to receive funding, the art may not criticize or offend anyone. Because the "decency and respect" provision violates the First Amendment, this Court should affirm the decision below.

III. ARGUMENT

A. UNDER *ROSENBERGER*, NEA GRANTS ARE FEDERALLY FUNDED "PRIVATE SPEECH" AND CANNOT CONSTITUTIONALLY BE SUBJECT TO "DECENCY AND RESPECT" VIEWPOINT DISCRIMINATION

1. The NEA And The "Decency And Respect" Restriction On Federal Arts Funding

In pursuit of a national policy of support for the arts, Congress created the NEA in 1965 to foster "the Nation's high qualities as a leader in the realm of ideas and of the spirit." 20 U.S.C. § 951(8). In creating the NEA, Congress declared

> it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent.

Id. § 951(7). The accompanying Senate committee report stated that "there [shall] be given the fullest attention to freedom of artistic and humanistic expression. . . [and] the encouragement of free inquiry and expression." S. Rep. No. 89-200, at 3-4 (1965). The Senate report made clear that

"[t]he standard should be artistic and humanistic excellence." *Id.*

Since 1965, the NEA has awarded over 110,000 grants to thousands of American artists and organizations in all 50 states.[2] Such grants are available to artistic projects meeting the standard of artistic excellence in several broadly defined categories and are intended to facilitate the diversity of private expression. *See* H.R. Rep. No. 99-274, at 13 (1985) ("[T]he [funded] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free."). In 1997, the President's Committee on the Arts and the Humanities noted that the NEA constitutes the largest single source of funds for the arts available today and observed that, since its inception in 1965, the NEA has prompted a "quantum leap in cultural activity" related to the arts. The President's Committee on the Arts and the Humanities, *Creative America: A Report to the President* 25-26 (1997).

In 1990, as the culmination of a two-year Congressional campaign to deny NEA grants to offensive art, Congress amended § 954(d) of the NEA's authorizing

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[2] NEA Strategic Plan FY 1997 – FY 2002 (visited Feb. 5, 1998) <*http://arts.endow.gov/Guide/Strategic/Contents.html*> at Introduction and Background at 2 (hereinafter "NEA Strategic Plan"). The NEA's 1997 Strategic Plan cites, as examples of the diverse activities supported by federal grants, symphonies, chamber music, children's festivals, puppet theater, art education, folk festivals, museum exhibitions, dance touring, children's museums, community celebrations, at-risk youth projects, research and publications on the arts, historic and cultural preservation, radio and television programs, and artists in schools. *Id.* at 1-2.

legislation[3] to include the "decency and respect" restriction at issue here. The Act provides in relevant part:

> In establishing [grant application] regulations and procedures, the Chairperson shall ensure that --
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.*

20 U.S.C. § 954(d) (emphasis added).

Congress enacted this restriction in response to sharp and sustained criticism of the NEA by some members of Congress and private interest groups who believed that some NEA-funded art was "indecent" or "sacrilegious." *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1461-62 (C.D. Cal. 1992); *see Finley v. National Endowment for the Arts*, 100 F.3d 671, 677 (9th Cir. 1996). Congressional criticism focused initially on two such NEA-funded exhibits: first, an exhibit of Robert Mapplethorpe's photographs that included images considered homoerotic; and second, an exhibit including a photograph by Andres Serrano entitled "Piss Christ" criticized as sacrilegious or blasphemous. *Finley*, 795 F. Supp. at 1461; *see, e.g.*, 135 Cong. Rec. 9788 (1989) (statement of Sen. D'Amato expressing his constituents' "shock . . . outrage and anger" at NEA funding of Serrano's work). The Court of Appeals found that the "decency and respect" amendment was "specifically designed to prevent the funding of similar art works." *Finley*, 100 F.3d at 677.

[3] The National Foundation on the Arts and Humanities Act ("the Act").

2. NEA Grants Are Federally Funded Private Speech That, Under The Principles Of *Rosenberger*, Are Entitled To Constitutional Protection Against Congressionally Mandated Viewpoint Discrimination

The government concedes that the First Amendment bars Congress from "prohibiting controversial art merely because either the government itself or some (or even many) private persons may find it inartistic or offensive." Br. Pet'r at 19. Nevertheless, the government contends that, in the context of federal funding, it may accomplish indirectly what it is prohibited from doing directly.

The First Amendment and the decisions of this Court permit no such result. Viewpoint discrimination in government programs which encourage private speech is presumptively unconstitutional.

The fundamental principles governing the application of the First Amendment to government funding of speech or other expressive conduct, clearly articulated in this Court's *Rosenberger* and *Rust* opinions, are as follows:

Government as Speaker. The first category of government funding programs comprises those in which the government is the speaker or enlists private entities to convey a governmental message. *See Rosenberger*, 515 U.S. at 832-33. In such cases, the government may properly disseminate the message of its choice and may take reasonable steps to ensure that "its message is neither garbled nor distorted" by persons enlisted to convey the government's message. *Rosenberger*, 515 U.S. at 833.

20 U.S.C. §951 *et seq.*

Thus, in *Rust v. Sullivan*,[4] the Court held that a regulation barring private recipients of federal family planning funds from providing information or counseling on abortion did not violate the First Amendment. *Rust*, 500 U.S. at 193-94; *see also Rosenberger*, 515 U.S. at 833 ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message").

The statute in question in *Rust* (Title X of the Public Health Services Act) authorized the government to fund the creation and operation of family planning clinics by public or private entities, but prohibited funding for programs that included abortion as a method of family planning. 500 U.S. at 178. The Department of Health and Human Services regulations promulgated under this statute barred grant recipients from recommending or advocating abortion when giving advice in clinics receiving Title X funds. *Id.* at 179-80. According to the Court, because "the government used private speakers to transmit specific information pertaining to its own program," this viewpoint-based restriction on speech was constitutionally permissible. Rosenberger, 515 U.S. at 833; *see Rust*, 500 U.S. at 195 n.4.

Thus, under the *Rust* analysis, if the government awarded grants designed to produce artworks conveying the government message of discouraging drug use or promoting the use of condoms to avoid the spread of AIDS, the government properly could insist that the art being funded convey the selected message. Simply put, according to *Rust* and *Rosenberger*, the government need not be neutral in its own message even if it uses private persons as its spokespersons.[5] *See Rosenberger*, 515 U.S at 833. But, as

[4] 500 U.S. 173 (1991).

[5] For example, Congress clearly could "hire[ ] a sculptor to create a bust . . . of Abraham Lincoln [for the Capitol], and prohibit him from doing a bust of John Wilkes Booth." See *Finley*, 100 F.3d at 689 (Kleinfeld, J., dissenting).

the Justice Department concedes, Congress did not create the NEA to convey a government message, and the *Rust* principles are, therefore, inapposite in this case.

Programs to Encourage Private Speech. Quite different principles apply when, as here, the government funds a program intended "to encourage private speech." *Rosenberger*, 515 U.S. at 833. When the government is not the speaker (either directly or through private persons) but instead expends funds to facilitate private speech, the First Amendment precludes the government from selecting which speakers receive government funding on the basis of the message they seek to convey. *Id.* at 829-33. *Rosenberger* is thus consistent with a long line of authority from this Court. *E.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citation omitted); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment").[6] In short, "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830 (citation omitted).

Significantly, in *Rosenberger*, the full Court accepted the constitutional distinction between funding "government speech" and funding "private speech." In the majority

[6] *Cf. Simon & Schuster v. Members of the New York Crime Victims Board*, 502 U.S. 105, 116 (1991) (content restrictions presumptively unconstitutional because they "raise[ ] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

opinion, Justice Kennedy set this forth definitively. *Id.* at 834 (Kennedy, J.; opinion of the Court). In his dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter noted that:

> [t]he Court draws a distinction between a State's use of public funds to advance its own speech and the State's funding of private speech . . . . I would not argue otherwise . . . .

Id. at 892 n.11.

In *Rosenberger*, the Court held unconstitutional a public university's refusal to pay certain costs of a student newspaper with religious editorial viewpoints even though it paid those costs for non-religious publications. *Id.* at 837. The purpose of the cost-reimbursement program was "to support a broad range of extracurricular activities that 'are related to the educational purpose of the University.'" *Id.* at 824 (citation omitted). Much like the NEA, the university program at issue in *Rosenberger* was established as a program to encourage private speech and not as a program to enlist private speakers to carry a government message. *See id.* at 834-35. The Court held that, having extended financial assistance to "private speakers who convey[ed] their own messages, the University may not silence the expression of selected viewpoints." *Id.*[7]

[7] The fundamental distinction articulated in *Rosenberger* finds further support in *Rust*. In *Rust*, the Court cautioned against any conclusion that "funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded program," justifies government regulation of the message conveyed. 500 U.S. at 199. Instead, the Court noted (i) that in areas "traditionally open to the public for expressive activity," the government subsidy implicit in allowing government-owned property to be used for

3. As the Justice Department Acknowledges, NEA Funding For The Arts Is A Program To Encourage "Private Speech" to Which *Rosenberger* Fully Applies

In the present case, the Court of Appeals correctly held that "[t]he NEA is a quintessential example of a Government program designed to encourage private speech" to which *Rosenberger* fully applies. *Finley*, 100 F.3d at 679 n.17; *see id.* at 682 (funding of the arts is required to be viewpoint-neutral because "Congress has clearly indicated the NEA's purpose is to support a diverse array of artistic expression"). Therefore, as demonstrated below, Congress' attempt through the "decency and respect" restriction to require the NEA to engage in viewpoint discrimination in allocating funding for the arts violates the First Amendment. And, of course, any other constitutional limitations such as vagueness would also apply.

The NEA's statutory purpose is, *inter alia*, to foster private artistic expression by creating "a climate encouraging freedom of thought, imagination and inquiry [and] also the material conditions facilitating the release of this creative talent." *See* 20 U.S.C. §951. Far from seeking to convey any *governmental* message or viewpoint, the Act is concerned with encouraging the broadest possible *private* expression involving the arts.[8] Indeed, as an "assurance

expressive purposes "does not justify [government] restriction of speech"; and (ii) that in a "traditional sphere of free expression," which would include a publicly funded university or the arts, government regulation over the content of speech is presumptively unconstitutional. *Id.* at 200.

[8] 20 U.S.C. 952(d), broadly defines "project" (an activity for which grants may be awarded) to include *e.g.*, "programs to foster American artistic creativity" and "to commission works of art."

against federal interferences in the arts," Congress expressly prohibited the NEA from interfering with the operations or policies of any arts organization. H.R. Rep. No. 89-618 (1965).

In pursuit of the NEA's goal of "foster[ing] opportunities for the creation and presentation of artistic work," the NEA supplies funds to private arts organizations to "provide resources, time and space to assist artists in creating work" and to enable such organizations to "present, exhibit, perform, and/or publish artistic work." NEA Strategic Plan at Goals at 1, Goals 2 at 1. The NEA also supplies funds to state and regional arts organizations to "support the creation of artistic work" and to "support the presentation, exhibition, performance, or publication of artistic works." *Id.*

Even the Justice Department has concluded that in "making NEA grants," the government's purpose is "to facilitate the speech of private persons, as those rationales are understood in *Rosenberger*." Letter from Andrew Fois, Assistant Attorney General, Department of Justice, to Congressman Sidney R. Yates at 2 (Oct. 5, 1995). The Justice Department expressed this conclusion in an opinion to Congress on the constitutionality of a proposed ban on NEA funding for arts projects which "denigrate the objects of belief of the adherents of a particular religion." *Id.* at 1. The opinion recognized that such a restriction would presumptively violate the First Amendment because it is aimed at a speaker's particular viewpoint. *Id.* at 2.

The Justice Department opinion letter continued:

> We do not think that the proposed restriction can be reconciled with the Court's decision in *Rosenberger*. The *Rosenberger* Court did recognize that its holding generally would not control cases in which the government subsidizes transmittal of its own preferred message, rather than expending funds to encourage the expression of private speakers. *Id.* at 2518-19 (distinguishing *Rust v. Sullivan*, 500 U.S. 173 (1991)). That distinction, however, will not save section 331, because *the government's purpose in making NEA grants appears to be less to 'convey a governmental message' than to 'facilitate the speech of private persons' as those rationales are understood in Rosenberger*.

Id. at 2 (emphasis added). A copy of this opinion is attached as Appendix B.

4. The Government's Argument That There Is No Private Speech Because NEA Funding Does Not Qualify As A Public Forum Mischaracterizes *Rosenberger* And *Rust*

Faced with *Rosenberger*'s constitutionally significant distinction between federally sponsored government speech and federally sponsored private speech, the government simply tries to ignore it and change the subject. The government claims that the *Rosenberger* case -- belying *Rosenberger*'s actual language -- created two categories: government speech and public forum speech.[9] As noted above, however, the operative categories in *Rosenberger*

[9] The starting point of the government analysis is that the two operative categories are "either conveying a governmental message or . . . creating a forum for the exchange of private views." Br. Pet'r at 30. Its brief repeatedly argues that the NEA does not "create such a forum" *But cf.* Fiscal Year 1992 Application Guidelines for NEA Theater Grants 51-52 (NEA's mission statement describing NEA as "a national forum to assist in the exchange of ideas").

were "government speech" and "private speech," not "public forum speech." Remarkably, the government fails to address the fact that, as the Justice Department itself has recognized, NEA grants constitute government-funded "private speech" which is afforded full constitutional protection under the express language and rationale of *Rosenberger*.

The government agrees that NEA grants are not subsidized governmental messages. The government rests its entire case on the assertion that NEA procedures do not create a public forum. Br. Pet'r at 30-37. In the government's view, an artistic creation merits a lower order of constitutional protection because it is not political speech or "conventional speech on matters of public concern" occurring in a "public forum." *Id.* at 30-31.

Nothing in *Rosenberger* supports the government's strained argument that the First Amendment protects private speech *only* in a public forum. Rather, *Rosenberger* broadly reaffirmed that in the realm of private speech or expression, government regulation may not discriminate on the basis of viewpoint. *Rosenberger*, 515 U.S. at 828-29.

Restrictions on governmental viewpoint discrimination in situations not involving a public forum are well-established. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (government regulations of speech on government property that is not a public forum must be viewpoint-neutral).[10] For example, in *Lamb's Chapel*, this Court applied the constitutional principle that, as applied to government

[10] The First Amendment's aversion to viewpoint discrimination is so strong that it even applies to less protected forms of speech such as "fighting words." *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 392 (1992) (ordinance punishing expression of "fighting words" which reflect some viewpoints but not others is unconstitutional on its face).

decisions affecting private speech, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." 508 U.S. at 394. There, this Court held that the government must use a viewpoint-neutral basis on which to grant use of scarce public resources to private parties. *Id.* The opportunity to obtain NEA grants is no different.[11]

To allow the government, through the allocation of federal funding, to impose such viewpoint-based discrimination upon private artistic expression also runs afoul of this Court's holdings barring the granting of tax or other financial benefits or penalties to speakers based upon the message they convey. *E.g., Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (differential tax treatment of "First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"); *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax exemption of religious, trade, sports and professional journals, but not general interest magazines violates First Amendment); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (state tax "target[ing] a small group of newspapers" held unconstitutional); *Simon & Schuster*, 502 U.S. at 115 (statute presumed unconstitutional "if it imposes a financial burden on speakers because of the content of their speech"). None of these cases involved a public forum. All

[11] The impact of the "decency and respect" restriction upon artists conveying unpopular or controversial messages in their art, and upon the audiences for such art, is greatly aggravated by the crucial role that NEA funding plays in assisting artists to create and display their works. In its 1997 Strategic Plan, the NEA stated: "despite the recent cutbacks, the Arts Endowment remains the largest single source of national leadership and support for the arts in America." NEA Strategic Plan at Introduction and Background at 4. As a practical matter, the impact of the "decency and respect" restriction in "driving from the marketplace" controversial or unpopular art will be very great.

involved challenges to government regulation discriminating on the basis of a private speaker's viewpoint.

Moreover, there is no policy reason why the Court should adopt the Government's bald suggestion that the private speech category should be limited only to public forum cases. Such a result would be particularly draconian and contrary to prior decisions of this Court because it would place no significant constitutional limits on viewpoint discrimination in any realm of private speech, except public fora.[12] Indeed, given the pervasiveness of government activity in supporting private speech in contexts beyond public fora, such an approach would put at constitutional risk a significant portion of the private speech subsidized by the government.[13]

Finally, the government asserts that NEA grants are some hybrid between government speech and private speech that should receive diminished constitutional protection. Br. Pet'r at 29-37. Under the government's view, it would be appropriate for the Congress to "selectively fund activities based on criteria that it rationally concludes, within the confines of the First Amendment, take into account the public interest." *Id.* at 37. Under the government's public

[12] The courts have applied a stringent test in determining what constitutes a "public forum," thus limiting even further the reach of the area which the Government says is protected from viewpoint discrimination. *See* Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 Stan. L. Rev., 185, 208 (1992).

[13] The government's claim that the NEA's selection process itself turns the grant into Government speech (and thereby devoid of constitutional protection) proves too much and contradicts its own acknowledgement that NEA funding for the arts does not constitute the government conveying its own message. Such a construct would turn every case of government funding of "private speech" into "government speech," thus destroying the very boundaries set forth in *Rosenberger* and *Rust*.

interest standard, except when funding a public forum, Congress would enjoy a free hand in the private speech area selectively to fund or subsidize some private speakers to the exclusion of others based upon the messages they conveyed whenever it "rationally concludes" that such viewpoint discrimination is in the public interest. Such a "hybrid" category would provide no more constitutional protection than *Rust*. Rather, the Government's purported "third category" of speech treats non-public forum "private speech" as comparable to the government-sponsored speech in *Rust* to which no constitutional protections apply. Such a result is irreconcilable with the principles announced in *Rosenberger* and other cases proscribing viewpoint discrimination in all areas of private speech. *See* below at 20-22.

The government's position would have a devastating effect on *amici* and other institutions that work in the arts and other areas. If simply providing government funds to an institution would permit content or viewpoint based restrictions, then government, at the federal, state, county, or local level, could prohibit libraries from carrying books on disfavored topics or by objectionable authors. The perspectives included in exhibits displayed by public museums could be censored to conform with the government's version of political correctness. Political officials, not professional journalists, could dictate the messages conveyed by public broadcasting programs. Tax exemptions could be denied to disfavored religious groups, and government officials could veto the second or third class mail permits of partisan political opponents or publications that criticize its policies.[14]

[14] The fact that such censorship would be permissible, of course, does not mean that government would "rush out at once to curtail the free speech rights of those with whom they deal." *Board of Trustees of Leland Stanford Junior Univ. v. Sullivan*, 773 F.Supp. 472, 478 n.19 (D.D.C. 1991). Nevertheless, "establishment of the principle that such

Under any view of the First Amendment, the arts -- like public universities, public fora supported by government funding, or the press -- constitute "a traditional sphere of free expression" entitled to the highest level of constitutional protection. *See Rust*, 500 U.S. at 200. As the Court of Appeals concluded, "the arts, no less than the university, are 'at the core of a democratic society's cultural and political vitality'" and require government neutrality in order to thrive. *Finley*, 100 F.3d at 682. In addition, as observed, the NEA's authorizing statute itself establishes the fundamental nature of the arts as a sphere of free expression. 20 U.S.C. §953(c) prohibits [NEA] or any other federal agency from interfering with the "policy determination" or "administration or operation" of non-federal organizations). *See also Finley*, 795 F. Supp. at 1473 (the arts is a "traditional sphere of free expression . . . fundamental to the functioning of our society"). (citation omitted) These considerations all the more strongly demonstrate that the viewpoint-based discrimination imposed by the "decency and respect" restriction on "private speech" is constitutionally impermissible.[15]

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action can pass constitutional muster is sure to be implemented, and it is bound to have increasingly wide negative effects on a free society, as the legality of censorship accompanying federal [and other government] monies becomes more and more common and thus more and more deeply ingrained in the fabric of government and society." *Id.*

[15] Judge Harold Greene sharply rebuked the government's efforts in the area of academic research to defend a "gag rule" requiring university researchers to obtain government approval before publishing or publicly discussing their federally funded research results. He flatly rejected the government's arguments, echoed in this case, that *Rust* is "applicable to government grants and contracts generally, without substantial limitation." Such a broad reading of *Rust* "would be an invitation to government censorship whenever public funds flow" and "would pose an enormous threat to the First Amendment rights of American citizens." *Leland Stanford Junior University*, 773 F.Supp. at 478.

Importantly, this Court in *Rosenberger* expressly rejected many of the same arguments raised by the government here. For example, the government argues that art is not protected speech because it "may not express a single, identifiable message that the government and other 'speakers' could in any conventional sense, endorse or oppose." Br. Pet'r at 30-31. In *Rosenberger*, however, this Court recognized that public discourse is not necessarily bipolar. 515 U.S. at 831. Similarly, although the government asserts that the "decency and respect" restriction is permissible because it relates to the allocation of scarce public resources, Br. Pet'r at 35, this Court in *Rosenberger* held that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 515 U.S. at 835. In addition, although the government argues here that the "decency and respect" restriction is constitutional because content-based distinctions are inevitable, Br. Pet'r at 19-20, this Court in *Rosenberger*, in holding that viewpoint-based restriction unconstitutional, recognized that "[h]aving offered to pay . . . the University may not silence the expression of selected viewpoints." *Id. See also Finley*, 795 F.Supp. at 1475.

B. THE "DECENCY AND RESPECT" RESTRICTION IMPOSES UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION BY WITHHOLDING FUNDING FROM ART EXPRESSING "DANGEROUS" OR "OFFENSIVE" IDEAS

1. Laws That Discriminate On The Basis Of The Speaker's Viewpoint Violate The First Amendment, And Laws Aimed At "Dangerous" Or "Offensive" Speech Are Particularly Suspect

As we demonstrate below, the "decency and respect" restriction on the award of NEA grants discriminates against artists on the basis of their viewpoints. This Court's precedents establish that such a viewpoint-based restriction on NEA funding of the arts violates the First Amendment.

It is axiomatic that

> [v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger, 515 U.S. at 829. "When the government targets not subject matter but particular views taken by the speakers on a subject, the violation of the First Amendment is all the more blatant." *Id. See also R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 387 (1992); *Lamb's Chapel*, 508 U.S. at 394 (quoting *Members of the City Council of the*

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).[16]

This Court has repeatedly stated that restrictions on speech aimed at the suppression of "dangerous" or "offensive" ideas are particularly suspect. *Rosenberger*, 515 U.S. at 834 (citations omitted); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (recognizing that the government may not "discriminate invidiously in its subsidies" in order to suppress particular viewpoints or "dangerous ideas"); *Leathers*, 499 U.S. at 452 (holding that a prohibited suppression of "dangerous ideas" can be discerned from a record of "hostile and oppressive discrimination"); *Cammarano v. United States*, 358 U.S. 498, 513 (1959); *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958).

Nor can the speech be restricted merely because the speech is "offensive" to some.[17] "[T]he fact that society may

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[16] Viewpoint-based restrictions on speech not only deprive speakers of their right of free expression, but also deny the audience its right to receive the speaker's message. An inherent corollary of freedom of speech is the right to receive information and ideas. *Board of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (recognizing that "[T]he dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") *Id.* at 867 (quoting *Lamont v. Postmaster General*, 381 U.S.. 301, 308 (1965) (Brennan, J., concurring).

[17] *See also Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549-50 (11th Cir. 1997) (state law banning colleges from funding student groups that advocated a lifestyle or actions prohibited by sodomy and sexual misconduct laws constitutes unlawful viewpoint discrimination); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366-67 (8th Cir. 1988) (public university's failure to fund a gay student group constitutes unlawful viewpoint discrimination when the school subsidized other student groups; "a group has no right to funding, but

find speech offensive is not a sufficient reason for suppressing it." *Simon & Schuster*, 502 U.S. at 118 (citation omitted). Indeed, the fact that the speaker's opinion gives offense is a reason for according it constitutional protection. *Id.* "[I]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* (citation omitted.)[18]

2. Congress' Directive To The NEA To Consider If Art Is Sufficiently "Decent" Or "Respectful" To Warrant Federal Funding Constitutes Viewpoint Discrimination

The starting point in construing any statute is its language. As amended, section 954(d) obligates the NEA in awarding a grant to "take into consideration" a two-fold standard in addition to a project's artistic merit. *See* 20 U.S.C. § 954(d)(1). First, the NEA must consider whether the proposed art project comports with "general standards of decency." *Id.* Second, the NEA must consider whether the project exhibits "respect for the diverse beliefs and values of the American public." *Id.* Both elements of this standard constitute viewpoint discrimination outlawed by the First Amendment.

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when funds are made available, they must be distributed in a viewpoint-neutral manner . . .").

[18] "Regulations based on the political or controversial subject matter of speech are particularly invidious, for they restrict public debate in that area most privileged by the First Amendment." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988); *see also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (vague regulation violates First Amendment because it permits viewpoint discrimination against dangerous ideas).

With respect to the first element, "decent" is defined as "characterized by conformity to recognized standards of propriety or morality." The American College Dictionary (1996); *see F.C.C. v. Pacifica Foundation*, 938 U.S. 726, 740 (1978) ("the normal definition of 'indecent . . . refers to nonconformance with accepted standards of morality.") (footnote omitted). This element thus requires the NEA to consider whether art offered for funding conforms with "general standards" of what our society considers proper or moral. Under this standard, art that takes issue with generally held notions of propriety or morality, or that expresses a viewpoint at odds with majority views of what is proper or moral, will fail to satisfy this element regardless of its artistic merit or excellence.

The second element of the "decency and respect" restriction requires the NEA to judge whether an art project exhibits "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). Taken literally, this element would proscribe federal funding for art likely to offend the "beliefs and values" of *any* segment of American society. To avoid failing this test, art would be required to show reverence for American beliefs and values: it cannot criticize and must offend no one.[19] *See Finley*, 795 F. Supp. at 1475 (section 954(d) seeks to "suppress [art] that is offensive to some in society"). Only the blandest and most conformist art could meet such a restrictive standard.[20]

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[19] One amicus has suggested that if the Court finds the "decency and respect" criteria ambiguous, it should restrict its meaning to blasphemous art. *See Amicus* Brief of Morality in Media. But such an approach would still be an unacceptable viewpoint discrimination. One person's blasphemy may be another's religious freedom.

[20] *See, e.g., The Sacred and the Profane: A Continuing Story in Western Art*, New Art Examiner, Summer 1990 at 18 (collecting examples of art masterpieces initially condemned as irreligious or sacrilegious). For

Each element of the "decency and respect" restriction constitutes impermissible viewpoint discrimination. Whether taken singly or together, the clear-cut intent is to "favor one speaker over another" by channeling NEA funding to art projects not conveying controversial or offensive messages. *See Rosenberger*, 515 U.S. at 528. Congress' attempt to withhold financial support for art expressing "dangerous" or "offensive" ideas exemplifies unconstitutional viewpoint discrimination.

3. The Legislative History And Events Surrounding The Enactment Of The "Decency And Respect" Restriction Confirm That It Is Aimed At Art Expressing "Dangerous" Or "Offensive" Ideas

As the Eighth Circuit recently held:

> [A] public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of ideology . . . . This will mean, to use Holmes' phrase, that the taxpayers will occasionally be obligated to support *not only the thought of which they approve, but also the thought that they hate*. That is one of the fundamental premises of American law.

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example, commenting upon Michaelangelo's painting of the Last Judgment in the Sistine Chapel, the critic and poet Peitro Aretino wrote:

> As a Christian I feel shame and offense to my soul at the liberty you have taken . . . Indeed, such a fervent display of genital organs as would even cause a brothel to blink. Such painting belongs in a voluptuary bathhouse . . . .

Id.

Gay and Lesbian Students Ass'n., 850 F.2d at 362 (emphasis added). The legislative history of the "decency and respect" amendment demonstrates that Congress intended to eliminate NEA funding for art embodying just this sort of "thought that they hate."

The "decency and respect" restriction represents the culmination of two years of intense Congressional criticism of the NEA in response to the use of federal funds to support exhibitions of works by Mapplethorpe, Serrano, and other artists producing "offensive" art.[21] *See* above at 6-7. Members of Congress denounced these works as highly offensive and blasphemous. For example, Senator D'Amato, together with twenty-five other senators, condemned the Serrano photograph as "shocking, abhorrent and completely undeserving of any recognition whatsoever." 135 Cong. Rec. 9788 (1989). Representative Baker described these works as "offensive to the vast majority of Americans" and "denigrating the values which are the foundation of our democracy." 135 Cong. Rec. 8809 (1989). Senator Helms expressed "outrage" at the NEA for supporting Serrano's work and claimed that the artist "went out of his way to

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[21] Notably, a jury acquitted the Cincinnati Museum of Contemporary Art and its art director on obscenity charges brought against them for displaying the Mapplethorpe exhibit. Lew Moores, *Barrie: Constitution the Real Winner Verdict Signals a Change*, The Cincinnati Enquirer, Oct. 6, 1990, at A07. In addition, several members of Congress recognized that the Serrano photograph was not within the purview of obscenity laws. *E.g.*, Reauthorization of the National Endowment for the Arts and Humanities: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, Serial No. 101-78, Vol. 3 at 72 (1990) (Statement of Rep. Dana Rohrabacher) (hereinafter "Reauthorization Hearings"). Minority Views of Senator Coats, Arts, Humanities and Museum Amendments of 1990, S. Rep. No. 101-472 (Sept. 25, 1990).

insult the Christian community."[22] 136 Cong. Rec. 33485 (1990). *See generally* Raleigh Douglas Herbert, *National Endowment for the Arts -- The Federal Government's Funding of the Arts and The Decency Clause*, 18 Seton Hall Legis. J. 413, 416 (1993).

Congressional leaders proposed various amendments to the legislation governing the NEA to prevent future funding for offensive art. In 1989, as part of the fiscal year 1990 Department of Interior and Related Agencies Appropriation Act, Congress enacted a broad content restriction barring art that depicted sadomasochism, homoeroticism, and sexual exploitation of children. This provision, held unconstitutional in *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774 (C.D. Cal. 1991), illustrates Congress' resolve to prevent the NEA from funding controversial or "offensive" art. *See, e.g.*, 135 Cong. Rec. 14375 (1989) ("We intend to remain vigilant and ensure that such scurrilous attacks on religious beliefs with Government support do not happen again") (Statement of Rep. Kasich); 135 Cong. Rec. 22376 (1989) ("I think we would agree that the two examples, the Serrano piece, that is the crucifix in urine, was unacceptable, insulting to the basic principles of everybody in the country") (Statement of Sen. Johnston).[23]

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[22] Serrano has defended his piece as a work that was sensitive to – not blasphemous toward – religion. He said that he was concerned with the debasement of religion in modern American society and chose this dramatic – and to some troubling – presentation to make this point effectively. Alan Parachini, *Panel Seeks Funding Ban on 2 Arts Groups*, L.A. Times, July 26, 1989.

[23] This Court should reject the government's suggestion that the "decency and respect" restriction is a constitutionally permissible compromise between members of Congress who advocated restrictions and those who did not. As the Court of Appeals observed, Congressional attention centered not on whether Congress should enact viewpoint based

As enacted, the "decency and respect" restriction was clearly aimed at prohibiting the funding of art offensive or "disrespectful" to the cultural and religious beliefs of politically significant segments of the American public. Representative Coleman said the new provision made clear that, under the restriction, "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. 28624 (1990). *See also, e.g.*, Reauthorization Hearings, Serial No. 101-77, Vol. 2, at 51 (Statement of Rep. Perkins) (federal funding of art should not be "inconsistent with those beliefs" that "purvey the view of this country"); *Id.* at 48-49 (Statement of Rep. Henry) (speaking of the "cruelty when artists deliberately confront society and question its moral and cultural assumptions"). Having been enacted as an attack against "dangerous ideas" and "offensive depictions," the "decency and respect" restriction cannot be said to be anything but a viewpoint-based restriction, and therefore is constitutionally impermissible.

The Justice Department itself concluded that if a decency restriction on NEA's funding was "intended or construed to reach certain depictions because the opinion or views reflected gave offense, then the restriction would raise very serious First Amendment concerns . . . ." *See* Appendix B at 4. In sum, in the words of the Justice Department, there can be no doubt that, in the "decency and respect" restrictions at issue here, the Congress aimed at "depictions" which "gave offense."

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restrictions, but on what form those restrictions would take. *Finley*, 100 F.3d at 677.

4. The "Decency And Respect" Restriction Cannot Be Defended As Directing The NEA To Consider Benign Factors Related To Public Support For The Art

In its brief, the government repeatedly suggests that the "decency and respect" restriction simply calls upon the NEA to consider legitimate factors pertaining to whether art "warrant[s] public financial support," such as the project's relevance, educational value, and suitability for special audiences. Br. Pet'r at 19, 32. But that is not what the restrictions were designed to do. Rather, the viewpoint-based "decency and respect" restrictions were aimed squarely at eliminating funding for art expressing offensive or dangerous ideas.

No case has been, or can be, made that art that is not sufficiently "decent" or "respectful" to pass muster under the Congressionally imposed restriction lacks sufficient artistic merit to warrant public support. If this were so, the challenged statutory amendment would be rendered redundant and superfluous, since "indecent" or "disrespectful" art would be excluded by the general "artistic merit" standard in place prior to this amendment. *See Finley*, 795 F. Supp. at 1471 ("Had Congress believed that 'decency' and 'respect for diverse views' was naturally embedded in the concept of 'artistic merit,' there would be no need to elaborate on that standard.").

In addition, it can hardly be said that art excluded from NEA funding by the "decency and respect" restriction would fail to "meet the needs of" or "appeal to" substantial and important audiences for art in the United States. As illustrated by the crowds attending the Mapplethorpe photography exhibit after its condemnation in Congress, art deemed "indecent" or "disrespectful"(and so potentially

excluded from NEA funding under the decency standard) may nonetheless be of interest to, and highly regarded by, sizable segments of the art audience. Elizabeth Kastor, *WPA Show Attracts Thousands*, Wash. Post, July 26, 1989, at C1.

5. The Requirement That "Decency And Respect" Be "Taken Into Consideration" In Awarding NEA Funding Exacerbates The Constitutional Violation

The government makes much of the fact that section 954(d) directs the NEA only to "take into consideration" whether a grant proposal complies with the "decency and respect" standard, which the government characterizes as a "nondispositive component" of the grant approval process. Br. Pet'r at 23-25, 43-45. That position is untenable; in other contexts, this Court has held unlawful government consideration of similar "nondispositive" but unconstitutional factors that had a determinative influence on the government's decision. *See e.g. Hazen Paper Co. v. Biggens*, 507 U.S. 604, 610 (1993).

Moreover, even if the government's construction of Section 954(d) were correct, the NEA would nonetheless be free, in any particular case, to decide whether, and to what extent, the "decency and respect" restriction should be applied. This Court has been vigilant to strike down enactments that vest "overly broad discretion" in a government official and thereby allow such viewpoint discrimination. *E.g.*, *Forsyth County Georgia v. Nationalist Movement*, 505 U.S. 123, 129-133 (1992). Given the potential of such open-ended discretion to "chill" artistic expression, the NEA's unfettered discretion in applying this standard would only exacerbate the constitutional violation.

IV. CONCLUSION

For the reasons discussed above, the Court of Appeals' decision holding the "decency and respect" provision unconstitutional should be affirmed.

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February 6, 1998

APPENDIX A -- STATEMENTS OF INTEREST OF INDIVIDUAL AMICI

Actors' Equity Association

Actors' Equity is the union of professional Actors and Stage Managers in the United States, representing close to 40,000 individuals. One of the basic tenets of this organization is to support freedom of expression and the right of artists (whether it be actor, director or playwright) to create unfettered by censorship. This has been Equity's position since it was founded in 1913.

American Arts Alliance

The American Arts Alliance was founded in 1977 and is the principal advocate for America's professional non-profit arts organizations and their publics in representing arts interests and advancing arts support before Congress and other branches of federal government. The Alliance comprises the following five national service organizations representing different arts disciplines -- Association of Art Museum Directors, Association of Performing Arts Presenters, Dance/USA, OPERA America, and Theatre Communications Group, representing a total of approximately 2500 member organizations from all across the nation. The Alliance advocates the development of national policies which recognize, enhance and foster the contributions that the arts make to America. We believe that not only does an individual's right of freedom of expression ensure such contributions, but also that the imposition by government of content and viewpoint restrictions on artists and arts institutions which receive government funds violates the First Amendment.

American Association of Museums

The American Association of Museums represents the entire museum community, including art, history, science, military and children's museums, as well as arboreta, aquariums, and zoos, and general and specialty museums. AAM comprises more than 15,300 active members, including more than 11,100 museum professionals, volunteers, and trustees; 1,300 corporate members; and 2,900 institutional members. Many of our members receive federal grants. We do not think it is in the best interest of the museum community or the United States for the federal government to be allowed to apply political and ideological tests to grants. The threatened actions in this case could severely curtail academic, scientific and artistic freedom in our member organizations.

Americans for the Arts

Americans for the Arts is the national organization for groups and individuals across the United States dedicated to advancing the arts and culture. Founded by both the American Council for the Arts, representing a broad network of arts supporters, patrons and business leaders, and the National Assembly of Local Arts Agencies, the country's largest alliance of community arts organizations, we strive to make the arts more accessible to every adult and child in America. To this end, we work with cultural organizations, arts and business leaders, elected officials, and patrons to provide leadership, advocacy, visibility, professional development, and research and information that will advance support for the arts and culture in our nation's communities and ensure that all Americans have access to and can participate in the arts. In addition, Americans for the Arts is a leading advocacy organization for public funding of the arts at the federal, state and local government levels and our

members include state and local art councils that subgrant federal, state and local government funds. To these ends, Americans for the Arts is concerned about the chilling effect of imposing content and viewpoint restrictions on publicly funded arts projects and the resulting effect on the creativity and free expression of artists and arts organizations. It is our belief that our nation needs to provide artists with a fertile environment for creativity through both public funding opportunities and enlightened cultural policies in order to advance the democratic values from which our republic was borne.

American Music Center

The American Music Center is a national service organization which promotes the creation, performance, and appreciation of American contemporary music. Founded in 1939 by composers such as Aaron Copland, Howard Hanson, and Otto Luening, the Center serves as an information resource concerning American music and as an advocate for the American composer. As an advocate for living American artists, we are concerned about the effect of content and viewpoint restrictions on the creative artist. It is important to insure that the composer is able to compose operas, choral works, songs, theater works, symphonies, and chamber music without the fear of censorship.

American Symphony Orchestra League

The American Symphony Orchestra League, founded in 1942 and chartered by an act of Congress in 1962, is the national organization serving America's 1,800 symphony and chamber orchestras. The League provides management resources, professional development programs, education programs, consultation, volunteer development, public

relations and marketing for its member orchestras. The League also publishes books and periodicals, including the bimonthly SYMPHONY, the only national magazine about American orchestras. The League is the voice of America's orchestras and represents their interests before Congress, federal agencies, and the public. The role of the public sector, and in particular that of the National Endowment for the Arts, has been pivotal in the growth and development of American music. To condition this support by placing viewpoint restrictions on artistic expression presents a threat to the creative force of orchestral music, just as it threatens creative expression in the rest of the arts and humanities.

Arts & Business Council

As a non-profit organization that seeks to encourage the arts and business sectors to develop mutually beneficial relationships that ultimately serve the interest of the community at large, the Council is deeply concerned about the *Finley* case. Founded in 1965, the Council has 28 affiliates in cities across the nation representing hundreds of arts and business institutions. In New York City alone, the Council's membership includes approximately 150 arts and cultural institutions, including the Lincoln Center, and about 100 businesses. The possibility that receipt of government funds may bring with it limitations on the freedom of expression is a result that is potentially harmful to everyone. Such content and viewpoint restrictions are in no one's best interest and, in our view, violate the First Amendment.

Association of American Publishers

The Association of American Publishers is the national trade association of the U.S. book publishing industry. AAP members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and

scholarly societies. Defending freedom of expression is one of the Association's top priorities. AAP supports artistic freedom for the National Endowment for the Arts, which plays such an important role in American letters. In addition, a number of AAP members are affiliated with institutions such as colleges and universities, which receive public funding, and the Association is concerned over the issue of tying such funding to government-imposed content and viewpoint restrictions.

Association of Art Museum Directors

The purpose of the Association of Art Museum Directors (AAMD) is to aid its members in establishing and maintaining high standards for themselves and the museums they represent. It serves as a forum for the exchange of information and the exploration of ideas, and as a voice with which museum directors express their joint concerns and those of their institutions. The AAMD, which was founded in 1916, represents one hundred sixty directors of the most important art museums throughout the United States, Canada, and Mexico. The AAMD is vitally concerned that freedom of expression be maintained. The various fields of artistic expression are exemplified throughout the history of civilization by societies which have and will continue to be measured by their cultural accomplishments. The culture of this nation continues to be substantially strengthened by the National Endowment for the Arts and its efforts on behalf of excellence and access, which should not be hampered by improper government viewpoint restrictions.

Association of Performing Arts Presenters

The Association of Performing Arts Presenters is a national association of performing arts presenters, touring artists and artists' managers. Founded in 1956, Arts

Presenters has a membership of approximately 1200 organizations dedicated to bringing audiences and artists together. Thirty percent of our presenting organization members are on university campuses with long histories of dealing with freedom of expression and academic freedom issues. Among our members are a number of individuals and organizations who would be directly harmed by a Congressional mandated decency standard. Arts Presenters seeks the inclusion of varied experiences in the belief that such pluralism leads to continued exploration and discovery which benefits both our membership and society. We welcome a broad cross-section of organizations and artists from throughout the world. This inclusive dynamic implies tolerance and respect for those with differing priorities and underscores the primacy of original thought. Our commitment to freedom of expression flows directly from these deeply held convictions.

Council of Literary Magazines and Presses

The mission of the Council of Literary Magazines and Presses is to preserve, promote and support literary magazines and presses. To this end, CLMP represents approximately 300 primarily not-for-profit, independent literary magazines and presses. These magazines and presses offer a door to freedom of expression in America. Experimental literature, work by emerging writers and writing by minority groups has been presented primarily by the independent literary magazines and presses in our country because economic concerns and cultural indifference have often precluded publishing in the commercial market. Publishers of periodicals and books that are primarily literary exist in all regions, all populations and all nationalities of our country. CLMP is a primary service organization and advocate in this dynamic field.

Dance/USA

Dance/USA, the national service organization for not-for-profit dance, seeks to advance the artform of dance by addressing the needs, concerns and interests of professional dance. Dance/USA was founded in 1982 following the release of a report by the Task Force for a National Dance Organization which called for the establishment of a national service organization for professional dance. Dance/USA's membership include over 250 ballet, modern, ethnic, jazz and tap companies, dance service and presenting organizations, individuals, and other organizations nationwide. With support from the American Arts Alliance, Dance/USA maintains active communications with its membership and provides research relating to grassroots advocacy efforts on arts-related issues and the legislative process. Dance/USA supports, among other things, federal funding for the arts, including the National Endowment for the Arts, and free expression for dancers and other artists.

Feminists for Free Expression

Feminist for Free Expression (FFE) is a non-profit organization composed of a diverse group of feminist women and men, including artist, writers, and scholars. FFE believes that laws discriminating against "indecent" or "disrespectful" ideas have traditionally been used to silence women and deter the growth of women's rights. We believe that genuine feminism encourages individual intellectual and artistic growth, including access to a broad range of ideas about sexuality, politics, and religion without the intervention of the state.

Freedom to Read Foundation

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association ("ALA"). The ALA is the oldest and largest library association in the world and the primary voice of the modern library movement in North America. The ALA established the Foundation to promote and defend First Amendment rights; foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and set legal precedent for the freedom to read of all citizens.

Hallwalls, Inc.

Hallwalls, Inc. is a multidisciplinary contemporary arts center located in Buffalo, NY. It presents programming in visual arts, film, video, performance, and music. Hallwalls' mission statement is to recognize and serve a vital community artistic presence which is global in its outlook, challenging in its ideas, pluralistic in its concerns, and diverse in its expression. In keeping with this mission Hallwalls is dedicated to work that challenges traditional artistic boundaries and critically engages with current issues in the arts and society. It is a vital part of this mission to protect the right of freedom of expression for artists, and free access to their works by interested individuals. Hallwalls was recently denied grant funding by the NEA National Council because of fears about the political reaction to the work of some Hallwalls sponsored artists, despite the fact that Hallwalls' grant proposal was judged of the highest artistic merit by the NEA peer review panels. NEA staff has encouraged Hallwalls to engage in self-censorship to improve its chances of future NEA funding. Thus, the

outcome of this case is of crucial importance to the ability of Hallwalls to fulfill its mission.

International Sculpture Center

The International Sculpture Center (ISC) is a U.S.-based, non-profit arts organization dedicated to both sculptors and contemporary sculpture. In this dual capacity, the ISC is a service and an educational organization, with more than 10,000 members in the U.S. Within the scope of the ISC, sculpture is most broadly defined as all developments in three dimensional art from the most traditional to the most experimental. The ISC focuses on the presentation of sculpture to local and national audiences; the collection and dissemination of significant technical, aesthetic, statistical and other newsworthy information on sculpture and sculptors; and above all, the development of a stable environment and support system which allows sculptors the security to create new work and advance their careers as professionals. In addition, the ISC's programs include other visual art mediums when such activities are deemed critical to the creation of a supportive environment for sculpture and sculptors. It is because of this mission that the ISC feels that the lower courts' decisions in *Finley v. NEA* should be affirmed. The "decency and respect standard" interferes with freedom of artistic expression under the First Amendment. To impose content and viewpoint restrictions of this type on artists applying for federal funding is therefore unconstitutional.

The Literary Network

The Literary Network, a project of the Council of Literary Magazines and Presses, Poets & Writers and other non-profit literary organizations, is organizing the field of literature, including writers, booksellers, librarians, English teachers, small presses and literary magazines, to respond to

attacks on freedom of expression. The Literary Network has a special focus on the National Endowment for the Arts.

The Museum of Modern Art

The Museum of Modern Art was founded in 1929 in New York to foster appreciation and understanding of the modern visual arts which were then rarely recognized by traditional art museums. As the preeminent institution devoted to the arts of the 20th century, The Museum of Modern Art has played a critical role in the evolution and recognition of modern art and design both in the United States and internationally. The Museum's collection now includes more than 100,000 paintings, sculptures, drawings, prints, photographs, architectural models and plans, and design objects, approximately 12,000 films and more than 4 million film stills. Attendance generally ranges between 1.2 million and 1.5 million visitors each year. The Museum of Modern Art opposes any legislative or any governmental interference with artistic freedom of expression, which it believes essential to creativity, and is proud to join in this *amicus* brief.

National Assembly of State Arts Agencies

The National Assembly of State Arts Agencies (NASAA) is a non-profit, tax exempt membership organization representing the state arts agencies of the United States and six U.S. jurisdictions including American Samoa, the District of Columbia, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands. NASAA serves as the collective voice and service organization for these agencies. NASAA believes the arts are central to the educational, economic and cultural well being of our society. Such a society values the unique capacities of individuals, the diversity of the cultural groups to which they belong and

the communities in which they live. NASAA, in support of the First Amendment's guarantee of freedom of expression, urges the Supreme Court to affirm the decisions below to protect this fundamental constitutional right.

National Public Radio

National Public Radio ("NPR") is a non-profit membership corporation which produces, acquires, and distributes news, informational, and cultural radio programming, such as *All Things Considered, Morning Edition, Talk of the Nation, and Performance Today*, to millions of listeners every day throughout the United States. NPR represents the interest of more than 590 member and affiliated public radio stations on matters of public policy affecting public broadcasting. NPR and many of its member stations have received direct support from the National Endowment for the Arts for the production of public radio programming. Continued access to such support, consistent with the First Amendment and journalistic prerogatives of NPR and public radio stations, is critical to the continued development and distribution of innovative programming of the highest quality.

New York City Arts Coalition

The New York City Arts Coalition represents over 100 non-profit arts organizations - from major museums to alternative spaces; from organizations to advocacy groups; and from borough arts councils to grant-givers. Since our establishment in 1986, we have provided economic data, policy analysis and advocacy support during every major budgetary and political crisis in the arts as well as providing support for ongoing non-crisis advocacy efforts. We regularly monitor proposed changes impacting the arts on the federal, state and local level. Our support for the arts and a

broad range of arts organizations includes promoting and defending the fundamental American principle of freedom of expression which is at stake in this important case.

New York Folklore Society, Inc.

The New York Folklore Society is a non-profit organization dedicated to furthering cultural equity and cross-cultural understanding through its progress serving the field of folklife in New York State. Folklife and folk culture expressions are rooted in community traditions and are intimately linked to a community's sense of identity. The standards applied to concepts such as decency vary widely across -- as well as within -- cultures and communities. A community or culture continually defines itself in changing circumstances partially through its free dialogue and debate about such categories. The guarantees of freedom of expression contained within the Constitution are absolutely essential enablers of this democratic process. It is this *process*, which occurs through the arts as well as through economic and political discourse, that the government should support; the government should not attempt to support or enforce a particular *outcome* of free exchange of ideas that identify the hallmark of democracy. On this basis, the New York Folklore Society is pleased to join this *amicus curiae* brief.

New York Foundation for the Arts

The New York Foundation for the Arts (NFYA), founded in 1971, provides direct financial support to individual artists and supports artists and art as central to cultural growth and diversity. One of the largest providers of artists services and programs of all artistic practices in the country, NYFA seeks to connect artists with audiences and educate audiences about the artist behind the art they see.

NYFA participates in education projects which help people understand the artists' condition in society and freedom of expression issues, based on a belief that creativity is the right of every citizen. The Foundation opposes any restrictions on artists' freedom of expression and supports government funding of the arts and artists.

PEN American Center

Pen American Center ("PEN") is an organization of over 2,500 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has take a leading role in attacking restrictive rules that limit freedom of expression in this country. PEN and its members have received NEA grants since 1965, and would suffer severe hardships in their efforts to create if the vague and uncertain "indecency" provisions were applied. Indeed, PEN administers or sponsors over ten literary awards in which leading authors pass judgment upon the literary merit of other writers. They would be at a total loss if they were required to apply such vague and viewpoint notions as "general standards of decency and respect" before awarding grants to applicants. These terms have no established meaning in the literary field, and applying them would require the governing boards to make political judgments totally foreign to their expertise. PEN accordingly joins this brief.

Putnam Arts Council

The Putnam Arts Council is a not for profit 501(c)3 cultural service organization chartered in 1963 by the state of New York for educational and museum purposes. Its mission is to promote, foster, perpetuate and encourage the arts in all forms in Putnam County and its environs. 1996 marked the 25th

anniversary of its operation at the Belle Levine Art Center facility in Mahopac. It is our firm belief that this local arts agency plays a key role not only in the development of the arts community -- its artists and its organizations -- but also in community building as a whole. The Putnam Arts Council impacts the development and growth of the community by fostering the integration of aesthetics and everyday life, articulating the community's identity and promoting economic stability and planned growth. We are pleased to join this *amicus curiae* brief in support of free expression in the arts.

Theatre Communications Group

Theatre Communications Group (TCG) is the national organization for non-profit professional theatres. TCG serves 324 theatres located in 44 states and the District of Columbia, and provides numerous services and programs to assist the work of thousands of actors, directors, playwrights, literary managers, and other theatre personnel. TCG offers fellowships, commissions and grants to promising playwrights, directors and designers; it commissions the publication of new works; and it does extensive research and reporting on the state of professional theatre. The non-profit theatres represented by TCG range from small ensemble companies to multi-million dollar institutions and perform and produce an immense variety of plays. Such theatres also contribute significantly to the development of new plays and playwrights. Every Pulitzer Prize-winning play since 1976 received its premiere professional production at a non-profit theatre. The theatres represented by TCG reflect the pluralistic nature of American theatre, and include companies devoted to creative enhancement and appreciation of a wide diversity of cultures. However, the richness of American theatre, and the freedom of artistic expression giving root to that diversity, have been endangered by the NEA's attempts to deviate from one of its primary stated tasks: to lend support to "projects and productions which have substantial artistic and

cultural significance, giving emphasis to American creativity and cultural diversity." TCG accordingly joins this brief.

APPENDIX B – DEPARTMENT OF JUSTICE OPINION LETTER

[attached]

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 5, 1995

The Honorable Sidney R. Yates
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Yates:

This letter presents the views of the Office of Legal Counsel on H.R. 1977, a bill making appropriations for the Department of Interior and related agencies for the fiscal year ending September 30, 1996. Our comments are limited to sections 331 and 332 of the bill, which place restrictions on the use of funds by the National Endowment for the Arts (NEA).

1. Section 331

Section 331 of the bill would prohibit the use of funds appropriated for the NEA "to promote, disseminate, sponsor or produce materials or performances which denigrate the objects or beliefs of the adherents of a particular religion." Because this provision "targets . . . particular views taken by speakers on a subject," see Rosenberger v. Rector and Visitors of Univ. of Virginia, 115 S. Ct. 2510, 2516 (1995), it presumptively violates the First Amendment Free Speech Clause.

In Rosenberger, the Supreme Court held that the University of Virginia violated the Free Speech Clause by denying otherwise available funds to student publications that "promote[d] or manifest[ed] a particular belief in or about" religion. Id. at 2513. Analogizing the University's funding program to a limited public forum, the Court concluded that the restriction on religious content constituted impermissible viewpoint discrimination, despite the fact that it extended equally to "any view on the merits of religion," id. at 2549 (Souter, J., dissenting), whether favorable or unfavorable. Id. at 2517-18. The restriction contemplated here, of course, is even more problematic than that at issue in Rosenberger. By selecting one particular viewpoint on religion for disfavored treatment -- that is, by denying funding not

for all art that reflects a view about religion, but only for art that "denigrate[s]" religion -- section 331 more self-evidently would operate to skew the "marketplace of ideas." Cf. id. at 2518.

We do not think that the proposed restriction can be reconciled with the Court's decision in Rosenberger. The Rosenberger Court did recognize that its holding generally would not control cases in which the government subsidizes transmittal of its own preferred message, rather than expending funds to encourage the expression of private speakers. Id. at 2518-19 (distinguishing Rust v. Sullivan, 500 U.S. 173 (1991)). That distinction, however, will not save section 331, because the government's purpose in making NEA grants appears to be less to "convey a governmental message" than to "facilitate[] the speech of private persons, as those rationales are understood in Rosenberger. Id. at 2519.[1] Nor can Rosenberger be distinguished for present purposes on the ground that it involved a program analogous to a limited public forum. Whether or not the government has opened a limited public forum, it may not single out and disfavor viewpoints to which it is opposed when it otherwise awards access to government property or grants for private speech. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (access to government charity drive, deemed nonpublic forum); Regan v. Taxation with Representation of Washington, 461 U.S. 540, (1983) (eligibility for lobbying subsidies). Because it contravenes this threshold requirement of viewpoint neutrality, applied most recently in Rosenberger, section 331 is "presumed impermissible" under the Free Speech Clause. Rosenberger, 115 S. Ct. at 2517.[2]

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[1] Were it otherwise -- that is, were NEA grants intended to "convey a governmental message" — then special Establishment Clause concerns might be raised whenever the NEA provided a grant in support of art with religious content. Funding of the student religious publication in Rosenberger was permissible under the Establishment Clause only because the University's program "respect[ed] the critical difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect." 115 S. Ct. at 2523 (internal quotation omitted). If the NEA funding program, by contrast, could be characterized as one "subsidiz[ing] transmittal of a message [the government] favors," id. at 2519, then inclusion of religious art in the program might be in tension with the Establishment Clause prohibition on governmental endorsement of religion. Id. at 2523.

[2] Because section 331 is so evidently infirm under the Free Speech Clause, we do not address here the distinct Establishment Clause concerns that are raised by the provision's apparent departure from the general rule that the government "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over

2. Section 332

Section 332 of the bill would prohibit use of NEA funds to "promote, disseminate, sponsor, or produce materials or performances that depict or describe, in a patently offensive way, sexual or excretory activities or organs." Under the viewpoint neutrality principles described above, this provision, too, may implicate Free Speech Clause concerns.

That is not to say that the government may not impose certain content-based eligibility criteria on access to government property and funds for private expression. In a funding program like that at issue in Rosenberger, for instance, analogous to a limited public forum, the government may make content-based distinctions in order to confine the forum to the specific purposes for which it was created. See id. at 2516-17. In a nonpublic forum, the government may engage in content-based regulation of access so long as its regulations are both viewpoint neutral and "reasonable in light of the purpose served by the forum." See Cornelius, 473 U.S. at 806. See also Regan, 461 U.S. at 547-50 (approving selective subsidization of speakers without forum analysis). In short, however the program is characterized, the First Amendment permits at least some content-based distinctions in the context of an arts-funding program like that administered by the NEA.[3]

Whether the restriction contemplated by section 332 would fall within this category of permissible content-based criteria depends on how it is construed and applied. We note that the Supreme Court has reviewed and approved, in a different context, a restriction on "indecent" expression framed in terms nearly identical to those of section 332. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978).[4] From Pacifica, it follows that a regulation based on "decency" considerations need not constitute impermissible viewpoint-based discrimination, but can instead be interpreted so that it does not

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nonadherents." See Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2487 (1994).

[3] See also Advocates for the Arts v. Thompson, 532 F.2d 792, 795 (1st Cir. 1976) (upholding denial of grant to literary magazine based on content of poem) ("The decision to withhold support is unavoidably based in some part on the 'subject matter' or 'content' of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.").

[4] At issue in Pacifica was FCC regulation of certain "indecent" speech, defined by the FCC to include depictions of "sexual and excretory activities in a patently offensive manner." 438 U.S. at 731-32.

operate to suppress disfavored views or opinions. Id. at 745 (Stevens, J.). If, however, section 332 were intended or construed to reach certain depictions because the opinions or views reflected gave offense, then the restriction would raise very serious First Amendment concerns under the principles outlined above.

Assuming that the provision at issue is construed and applied in a viewpoint neutral manner, a question might still remain as to whether the restriction is "reasonable" in this context. Pacifica, which relies on the special justifications for restricting broadcast speech accessible to children, see 438 U.S. at 748-50, offers little support in this respect. But section 332 can readily be justified by reference to its own unique context. For instance, Congress reasonably could decide that decency considerations should be one component[5] of the content-based aesthetic judgments necessarily implicated by an arts-funding program. See Advocates for the Arts, 532 F.2d at 796 ("If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.").

Sincerely,

Andrew Fois
Assistant Attorney General

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5 See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.")

EDITOR'S NOTE

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